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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAC 2005-60; FAR Case 2012-007; Item III; Docket 2012-0007, Sequence 1]

RIN 9000-AM26

Federal Acquisition Regulation; Extension of Sunset Date for Protests of Task and Delivery Orders

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement sections of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, and the National Defense Authorization Act for Fiscal Year 2012. These statutes extend the sunset date for protests against the award of task or delivery orders from May 27, 2011, to September 30, 2016.

DATES: Effective date: [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER.**]

Comment date: Interested parties should submit written comments to the Regulatory Secretariat on or before

[insert date 60 days after FEDERAL REGISTER publication date] to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-60, FAR Case 2012-007, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2012-007". Select the link "Submit a Comment" that corresponds with "FAR Case 2012-007."

Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2012-007" on your attached document.

- Fax: 202-501-4067.

- Mail: General Services Administration,
Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275
First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005-60, FAR Case 2012-007, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Lague, Procurement Analyst, at 202-694-8149 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-60, FAR Case 2012-012.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the Federal Register at 76 FR 39238 on July 5, 2011, entitled "Extension of Sunset Date for Protests of Task and Delivery Orders" (FAC 2005-53, FAR Case 2011-015). The rule implemented section 825 of the Ike Skelton National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 (Pub. L. 111-383, enacted January 7, 2011). The rule extended the sunset date for protests of task and delivery orders valued in excess of \$10 million for Title 10 agencies, namely DoD, NASA, and the Coast Guard. The rule did not extend the sunset date for Title 41 agencies as there was no comparable change to Title 41 at that time.

Subsequent to the publication of the interim rule under FAR Case 2011-015, section 813 of the NDAA for FY 2012 (Pub. L. 112-81, enacted December 31, 2011) made comparable changes to Title 41 to extend the sunset date for protests against the award of task and delivery orders from May 27, 2011, to September 30, 2016. In order to accomplish the statutory changes for both Title 10 and Title 41, FAR Case 2011-015 is not being issued as a final rule and is instead being renumbered and incorporated into this second interim rule, FAR Case 2012-007.

II. Discussion and Analysis

A. Summary of significant changes

FAR 16.505(a)(10)(ii) is amended to extend, for Title 41 agencies, the authority to protest the placement of task and delivery orders valued in excess of \$10 million from May 27, 2011, to September 30, 2016.

B. Analysis of public comment

One public comment was received for FAR Case 2011-015. The public comment and response are provided as follows:

Comment on FAR Case 2011-015: The respondent indicated that the sunset date for protest of orders should extend to Title 41 agencies, not just Title 10 agencies.

Response: The rule has been changed to incorporate and implement the later-enacted section 813 of the NDAA for FY 2012 to extend the sunset date for the protest of task and delivery orders from May 27, 2011, to September 30, 2016, for Title 41 agencies.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and

of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The change may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, et seq. The Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

The objective of this rule is to implement section 825 of the NDAA for FY 2011, which extended the sunset date for Title 10 agencies and section 813 of the NDAA for FY 2012, which extended the sunset date for Title 41 agencies.

The authority to file protests against the award of task or delivery orders is relatively new, and there is little data available, as such protests may be filed with the agency or Government Accountability Office (GAO). GAO has exclusive jurisdiction of a protest of an order valued in excess of \$10 million. Data on agency-level protests is not compiled outside the agency concerned; therefore estimates are based on the total number of protests filed at the GAO in FYs 2009, 2010 and 2011. The data was extracted from GAO's report to the Congress for those fiscal years.

Offerors can protest to the agency or to the GAO. Assuming that one-half of all protests are filed with the GAO and the other half are filed with the agency, then the average number of protests filed per fiscal year would be 6,700 (see below):

Fiscal Year 2009 protests to GAO	2,000
Fiscal Year 2010 protests to GAO	2,300
Fiscal Year 2011 protests to GAO	2,400
	<hr/>
	6,700
Divided by	3
Average annual GAO protests	2,233
Multiplied by	2
Estimated total number of protests	4,467

Protests may be filed against the award of contracts as well as certain task or delivery orders. There are few prohibitions on the grounds for protests against the award of a contract. However, protests against the award of a task or delivery order are limited to (a) a protest on the grounds that the order increases the scope, period, or maximum value of the contract; or (b) a protest of an order valued in excess of \$10 million. Therefore, it is reasonable to assume that less than 50 percent of the total number of protests filed is against the award of a task or delivery order. A generous estimate is approximately one-fourth, or 1,117. Likewise, only a percentage of the protests against the award of a task or delivery order are made by small businesses. Even if we assume that percentage to be one-half, then the number of protests filed by small businesses against the award of a task or delivery order is estimated to be 559.

# protests of task/delivery orders	
by small businesses	559
% of protests sustained	x .03
# of task/delivery orders protests sustained	<u>17</u>

The number 17 represents the number of small business task or delivery order protests sustained in a fiscal year. This number is representative of protests against awards by all Government agencies.

There is no requirement for small entities to submit any information under this provision. Therefore, no professional skills are necessary on the part of small entities for compliance, and the cost to small entities associated with this provision is \$0.

The Regulatory Secretariat will be submitting a copy of the Initial Regulatory Flexibility Analysis (IRFA) to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments

separately and should cite 5 U.S.C. 610 (FAC 2005-60, FAR Case 2012-007) in correspondence.

V. Paperwork Reduction Act

The interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

VI. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because statutory authority for Title 41 offerors to file certain bid protests lapsed May 27, 2011, but was reinstated in the National Defense Authorization Act for Fiscal Year 2012, effective December 31, 2011. Similar authority for Title 10 offerors was extended by a January 7, 2011, statute, and has already been implemented in the FAR. If this rule is not published on an interim basis, offerors could be misinformed about their legal right to file certain protests. Disappointed Title 41 offerors would be unclear on whether to file bid protests of civilian agency task and delivery order awards at either the GAO or the Court of

Federal Claims. This interim rule clarifies that GAO has exclusive jurisdiction of a protest of an order valued in excess of \$10 million. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Part 16

Government procurement.

Dated: July 16, 2012

Laura Auletta,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 16 as follows:

PART 16—TYPES OF CONTRACT

1. The authority citation for 48 CFR part 16 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 16.505 by removing from paragraph (a)(10)(i) introductory text "under Subpart 33.1" and adding "under subpart 33.1" in its place; and revising paragraph (a)(10)(ii) to read as follows:

16.505 Ordering.

(a) * * *

(10) * * *

(ii) The authority to protest the placement of an order under (a)(10)(i)(B) of this section expires on September 30, 2016 (10 U.S.C. 2304a(d), 10 U.S.C. 2304c(e), 41 U.S.C. 4103(d), and 41 U.S.C. 4106(f)).

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07/26/2012]